United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5024

United States Court of Appeals

For the Second Circuit

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P/S

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,
Plaintiff-Appellant,

against

NEW YORK PRODUCE EXCHANGE, *et al.*,
Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

REBUTTAL BRIEF FOR DEFENDANTS-APPELLEES

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
Attorneys for Defendants-Appellees New York Produce Exchange, Donald V. MacDonald, Sidney Fashena and I. Usitkin & Co.
299 Park Avenue
New York, New York 10017
(212) 688-0400

DEWEY, [illegible] PALMER & [illegible]
Attorneys for Defendants-Appellees Walter C. Klein and Bunge Corporation
140 Broadway
New York, New York 10005
(212) 344-8000

BROWN, WOOD, IVEY, MITCHELL & PETTY
Attorneys for Defendants-Appellees Harry E. Anderson and Merrill Lynch, Pierce, Fenner & Smith Incorporated
One Liberty Plaza
New York, New York 10006
(212) 349-7500

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendants-Appellees Harold H. Vogel and Continental Grain Company
345 Park Avenue
New York, New York 10022
(212) 644-8000

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REBUTTAL BRIEF OF DEFENDANTS-APPELLEES

Preliminary Statement

This rebuttal brief is submitted in order to respond to an argument raised neither at trial nor in appellant's main brief. Plaintiff argues in his reply brief (pp. 2-4) that he is not chargeable with Haupt's misconduct because plaintiff is not Haupt, but only Haupt's trustee in bankruptcy.

We submit this brief to demonstrate that, as we stated in our principal brief (p. 4), and as the District Court charged the jury without objection (Tr. 6335-6337), Haupt must be considered the true plaintiff in this case. We shall also comment very briefly on plaintiff's practice of distorting the facts—a practice in which he continues to engage in his reply brief.

ARGUMENT

POINT I

Plaintiff is suing in the right of Haupt and is subject to the same defenses as Haupt.

Plaintiff tries to confuse the issue by stating in his reply brief that he "is suing on behalf of Haupt's creditors" (p. 3). His complaint shows the contrary: he is suing for an alleged wrong to *Haupt*. The amended complaint states that defendants' alleged violations of the Commodities Exchange Act "caused Haupt to suffer damages in an amount exceeding $12 million" (JA 26a) and that by reason of the alleged antitrust violations "Haupt's business and property was injured in an amount exceeding $12 million." (JA 27a). Haupt's creditors are not even referred to in the two claims now before the Court.

In other words, plaintiff is suing pursuant to Sections 70(a)(5) and 70(a)(6) of the Bankruptcy Act, 11 U.S.C. §§110(a)(5) and 110(a)(6), which authorize a trustee in bankruptcy to assert the bankrupt's rights of action; he does not claim to be suing pursuant to Section 70(e) of the Bankruptcy Act, 11 U.S.C. §110(e), which confers on a

trustee whatever powers of avoidance a creditor of the bankrupt might have had under federal or state law. 4A, Collier, *Bankruptcy* §70.69 at 762 (14th ed. 1976).* No authority suggests that a trustee in bankruptcy can sue on behalf of creditors under the Commodities Exchange Act or the antitrust laws in a situation like this one. Plaintiff has never contended for such a creditor's right of action in the whole history of this case—and it is too late for him to do so now.

When a trustee asserts a bankrupt's right of action under Section 70(a), he stands in the bankrupt's shoes regarding defenses to the action. 4A, Collier, *Bankruptcy* §70.28 at 385 (14th ed. 1976); *Wiley* v. *Public Investors Life Insurance Company,* 498 F.2d 101 (5th Cir. 1974); *In re Woodworth,* 85 F.2d 50 (2d Cir. 1936). This principle is basic to bankruptcy law, and we are aware of no authority which rejects it. *See Caplin* v. *Marine Midland Grace Trust Co.,* 406 U.S. 416 (1972); *Schneider* v. *O'Neal,* 145 F.Supp. 120 (E.D. Ark. 1956), *rev'd on other grounds,* 243 F.2d 914 (8th Cir. 1957). In *Schneider,* both the District Court and the Court of Appeals agreed that a bankruptcy trustee, to the extent that he sued in the right of the bankrupt, cannot recover where the bankrupt was *in pari delicto* with the defendant.

Plaintiff offers no reason for abandoning the well-established principle that a trustee in bankruptcy suing in the right of the bankrupt is subject to the same defenses as the bankrupt. Plaintiff relies on two District Court

* A third claim was brought by plaintiff on behalf of Haupt's creditors, asserting that the transfer of $12 million from Haupt to the Clearing Association was "fraudulent as against creditors of Haupt." (JA 28a). The third claim has been settled between plaintiff and the Clearing Association and is not in issue on this appeal.

cases, *Lank* v. *New York Stock Exchange*, 405 F.Supp. 1031 (S.D.N.Y. 1975), and *Collins* v. *PBW Stock Exchange, Inc.*, 408 F.Supp. 1344 (E.D. Pa. 1976). The plaintiff in *Lank* was a receiver appointed by the Delaware Court of Chancery; the plaintiff in *Collins* was a trustee appointed under the Securities Investors Protection Act. In both *Lank* and *Collins*, it was held, on motions to dismiss, that the defense of *in pari delicto* would not be applied to dismiss an action brought against a national securities exchange under Section 6 of the Securities Exchange Act of 1934.*

It seems from the *Lank* and *Collins* opinions that the same results might have been reached if the plaintiff had been the insolvent firm itself, rather than its receiver or trustee. However, the opinion in *Lank*, in a passage quoted with approval in *Collins*, does suggest that the receiver may be standing in a better position than the insolvent firm. Judge Lasker stated:

> "The . . . reasoning [of *New York Stock Exchange* v. *Sloan*, 394 F.Supp. 1303 (S.D.N.Y. 1975)] supports an action by a corporation, at least where, as here, the action is asserted by a receiver in liquidation." 405 F.Supp. at 1037.

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* On the issue of the *in pari delicto* defense, *Lank* and *Collins* are distinguishable from the present case on many grounds: they were brought under a different statute and did not arise, as does the present case, after a full trial had demonstrated the culpability of the party on whose behalf the plaintiff sued. To the extent that dicta in *Lank* and *Collins* are inconsistent with the discussion at pages 52-59 of our principal brief, we submit that the Court should not follow these two District Court decisions, but rather the sounder authorities on which our principal brief relies.

We note that *Woolf* v. *S. D. Cohn & Co.*, 515 F.2d 591 (5th Cir. 1975), cited by plaintiff at pages 5-6 of his reply brief, has been reversed by the Supreme Court, 44 U.S.L.W. 3737 (June 21, 1976).

Whatever the importance of the above statement to *Lank* and *Collins*, it has no relevance to the present case. The *Lank* court expressly distinguished Judge Carter's summary judgment opinion in this case, stating that a bankruptcy trustee under Sections 70(a)(5) and (6) of the Bankruptcy Act "is subject to the same defenses as the corporation." 405 F.Supp. at 1038. Since this case involves a partnership, not a corporation, and a bankruptcy trustee, not a receiver, the facts which Judge Lasker found to support an action in *Lank* are absent here.

Moreover, in suggesting that the outcome of an "action by a corporation" might depend upon whether the action is "asserted" by the corporation or its receiver, we submit that Judge Lasker erred. Nothing in common sense or authority supports the proposition that the accident of receivership should give to a corporation or any other entity any greater rights than it had before. If the creditors of an insolvent estate have a cause of action, they should assert it—or if empowered by law to do so, the receiver or trustee should assert the creditors' cause of action on behalf of the estate. Here, there is no creditor cause of action, and no creditor has sued; the trustee has asserted only Haupt's cause of action under Section 70(a). There is no reason why he should not be subject to the same defenses as Haupt.

In suggesting that a receiver suing in the right of the corporation might not be chargeable with the corporation's wrongdoing, the *Lank* court relied on cases involving the receiver's rights to maintain an action to void a transfer in fraud of creditors. 405 F.Supp. at 1037.

These cases seem to have been inapposite in *Lank*, and they are certainly inapposite here. Actions to void fraudulent transfers assert the rights of creditors pursuant to Section 70(e) of the Bankruptcy Act;* this action under the Commodity Exchange Act and the antitrust laws asserts the right of Haupt alone.

It would indeed be anomalous if plaintiff could be in a better position than either Haupt or its creditors. The anomaly is illustrated by the facts of this case. The creditors of Haupt are not all "innocent third parties" as plaintiff claims (Reply Br. at 3). The principal creditors are the major New York banks—including The Chase Manhattan Bank, which, as the record shows, had adverse information about DeAngelis and Allied prior to the events in suit, but nevertheless reassured defendant Anderson when Anderson asked Chase about Allied's reliability (JA 1269a-1270a).

If this action had been brought on behalf of Chase and Haupt's other creditors—and if it were held, contrary to our view, that a cause of action exists on such creditors' behalf—much more evidence about these creditors' conduct in 1963 might have been introduced at trial. Defendants would have had an opportunity to show that the creditors' conduct should bar any action on their behalf. Defendants had no such opportunity; but plaintiff, while not suing on

* Moreover, the fraudulent transfers to be avoided under the strong-arm provisions of the Bankruptcy Act necessarily involve the derelictions of the bankrupt himself. If the *in pari delicto* defense could be raised in all fraudulent transfer situations, the sections would have no vitality. *See* 4A, Collier, *Bankruptcy* §70.71 at 786-87 (14th ed. 1976). Neither the provisions themselves nor the resulting rationale is applicable here.

behalf of the creditors, now contends in a reply brief that the creditors are the "real parties in interest." (Reply Br. at 3). His argument is without merit. This case was brought and tried below, and must be decided here, on the basis that Haupt is the true plaintiff.

POINT II

Plaintiff has not dealt fairly with the facts.

It must seem to anyone reading the briefs on this appeal as if the parties were writing about two different cases; the facts as stated by plaintiff simply do not resemble the facts as stated by defendants. This is because plaintiff has consistently and radically distorted the record. Testimony is taken out of context, so that its meaning is reversed or the insignificant is made to seem sinister. Colorful descriptions and snide remarks are substituted for statements of fact. Through the use of collective labels, nouns and pronouns—"trade-regulators," "defendants," and "they"—distinctions among the defendants are obscured, and evidence offered only against certain defendants at trial is used to impute to all of them a pool of knowledge which was in fact available only to Haupt and Allied themselves.

A list of the distortions in plaintiff's principal brief and reply brief would be unduly long, could not be all-inclusive, and of course would not eliminate the need for this Court to consult the record itself. We can only ask that the Court refer to the record citations in both plaintiff's and defendants' briefs, and that the cited passages

be read in context. When this is done, it will be clear why the plaintiff has distorted the record; it is because the evidence in this case is wholly adverse to his claim.

Conclusion

For the foregoing reasons and those stated in our principal brief, the judgment below must be affirmed.

Dated: New York, New York
September 10, 1976

Respectfully submitted,

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Defendants-Appellees New York Produce Exchange, Donald V. MacDonald, Sidney Fashena and I. Usiskin & Co.

BROWN, WOOD, IVEY,
MITCHELL & PETTY
Attorneys for Defendants-Appellees Harry B. Anderson and Merrill Lynch, Pierce, Fenner & Smith Incorporated

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
Attorneys for Defendants-Appellees Walter C. Klein and Bunge Corporation

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
Attorneys for Defendants-Appellees Harold H. Vogel and Continental Grain Company

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WEIL, GOTSHAL & MANGES
Attorneys for Pet-Appellant

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